No. 93-862

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

BELLSOUTH ADVERTISING & PUBLISHING CORPORATION,
*Petitioner,*
v.
DONNELLEY INFORMATION PUBLISHING, INC., and
THE REUBEN H. DONNELLEY CORPORATION,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF UNITED STATES TELEPHONE ASSOCIATION IN SUPPORT OF PETITIONER


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## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF UNITED STATES TELEPHONE ASSOCIATION IN SUPPORT OF PETITIONER

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United States Telephone Association ("USTA") hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for petitioner, BellSouth Advertising & Publishing Corporation, has been obtained. The consent of the attorney for respondents, Donnelley Information Publishing, Inc., and The Reuben H. Donnelley Corporation, was requested but refused.

The interest of USTA in this case arises from the fact that most of its members are companies that, directly or through subsidiaries, publish and register with the Copyright Office telephone "yellow pages" directories. Yellow pages directories are important sources of income for these companies and help keep the costs of local telephone service down. The decision below calls into question the scope of copyright protection available for yellow pages advertising directories or directory sections. USTA believes that the attached brief will assist the Court in determining whether certiorari should be granted in this case.

Respectfully submitted,

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December 30, 1993

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## BRIEF OF *AMICUS CURIAE* UNITED STATES TELEPHONE ASSOCIATION IN SUPPORT OF PETITIONER

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### INTEREST OF THE *AMICUS CURIAE*

The United States Telephone Association ("USTA") is the principal trade association of local telephone companies in the United States. It was established in 1897. Local telephone companies, sometimes called exchange carriers, are the primary providers of local telecommunication services in most parts of the United States.

USTA's membership includes nearly 1100 of the nation's approximately 1350 local telephone companies. The membership is comprised of companies of varying sizes. Some of its members are large telephone companies

such as the seven Bell operating companies. The majority are small companies that provide fewer than 10,000 lines.

Most of USTA's members are companies that, directly or through subsidiaries, publish and register with the Copyright Office telephone "yellow pages" directories. Yellow pages directories are important sources of income for these companies and help keep the costs of local telephone service down. The decision below calls into question the scope of copyright protection available in such directories. USTA submits this brief to assist the Court in determining whether certiorari should be granted in this case.

## SUMMARY OF ARGUMENT

The yellow pages are a vital public resource—providing useful consumer information and guidance to callers and a critical source of advertising for local businesses. They also provide significant revenues to local telephone companies, some or all of which may be used to help them to provide universal service at reasonable rates. The decision below destroys much of the economic incentive to create these directories. The creation of yellow pages is expensive and time-consuming. If yellow pages are denied the copyright protection they have enjoyed for years, the incentive to publish complete and accurate guides—customized to consumer preferences and expectations—would be eroded. The result would be a diminution in the quality of future directories. To assure the continued viability of this resource, the Court should grant certiorari and resolve the direct conflict between the decision of the court below and that of the Second Circuit in *Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc.*, 945 F.2d 509 (2d Cir. 1991).

## ARGUMENT

The court below held that yellow pages publishers are not entitled to copyright protection for their selection, coordination, and arrangement of business listings under the classified headings they choose for their directories. Petitioner has amply demonstrated that the decision below is contrary to this Court's decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), and in direct conflict with the decision of the Second Circuit in *Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc.*, 945 F.2d 509 (2d Cir. 1991), and with the decisions of a number of other circuits applying *Feist* to other types of factual compilations. We will not repeat those points here. We write, instead, simply to stress the importance of this case to the yellow pages publishing industry (including USTA members) and to the public in general.

The yellow pages serve a number of important functions. The organization of listings under carrier-chosen headings enables callers to survey selected businesses providing the type of goods and services they are looking for in their immediate geographic area, and often in surrounding areas, without having to scan through the alphabetical "white pages" business listings and to guess, from the name of the business, what products and services are provided by the business. At the same time, the yellow pages provide a highly effective means for businesses to advertise. In fact, yellow pages have become one of the most significant and successful means for businesses to advertise their goods and services—especially for small businesses. Local advertisers represent about 88% of total yellow pages advertising.

When yellow pages are compiled, employees of the publisher typically make a number of discretionary determinations. First, they determine how expansive each directory will be, in terms of geographic scope, and how comprehensive the directory will be, in terms of the busi-

nesses that are listed. These initial decisions help determine how useful the directory will be, and they vary widely from one directory to the other. For example, C&P Telephone publishes a very comprehensive two-volume listing of businesses in the District of Columbia. It also publishes additional volumes covering suburban Maryland and Virginia. A competing publisher, by contrast, offers something called "The One Book," which is a highly selective listing of businesses throughout the Washington Metropolitan area. The One Book offers the convenience of a single, slender volume covering a wide area; C&P offers a more thorough (but more bulky) alternative.

The publishers also determine the general headings under which businesses are to be listed based on their perception of how consumers will use the book; here, too, substantial variation can be found. See generally *Southwestern Bell Media, Inc. v. Trans Western Publishing, Inc.*, 670 F. Supp. 899, 907 (D. Kan. 1987). And they determine, usually in consultation with the owners, what headings a particular business should be listed under and whether that business warrants listing in several geographic directories.

The collection, selection and arrangement of listings and advertisements for a yellow pages may not require the creativity of a Leonardo, but it does require a myriad of discretionary, editorial judgments. The result is an original work that displays sufficient creativity to warrant copyright protection.

The decision below, by denying such protection, destroys the economic incentive to create and consistently improve these directories. The creation of yellow pages is expensive and time-consuming. If the first compiler were unable to protect it under the Copyright Act from competitors who copied the guide, the first compiler would have little incentive to continue publication and improvement of a complete and accurate guide. The result would

be a diminution in the quality of the future yellow pages. As this Court has noted, " '[i]f every volume that was in the public interest could be pirated away by a competing publisher, . . . the public [soon] would have nothing worth reading.' " *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985) (citation omitted).

The decision below has particularly harsh consequences for local telephone companies, which traditionally prepare yellow pages directories along with their provision of local telephone service. Yellow pages advertising revenue in the United States in 1992 exceeded $9.3 billion—roughly 10 percent of local telephone company revenues. In many cases, the revenue derived from yellow pages advertisements can be an important component of a local phone company's ability to provide universal service at affordable rates, the primary goal of national communications policy. 47 U.S.C. § 151. This is particularly true for the smaller, more rural telephone companies that comprise much of USTA's membership. Without copyright protection, local telephone companies will bear the costs associated with creating the directories and competitors will simply pirate them and then undercut advertising rates.

The decision below also threatens to handicap new innovations such as "electronic yellow pages." Yellow pages are just beginning to be offered in computer-accessible formats that permit quick searches and constant updates. These electronic directories, like their hard copy counterparts, will have unique headings and arrangements, along with such additional tools as menus and navigational aids. Such directories, in addition to providing a new public service, would represent an additional revenue source for the local telephone companies. Yet the information in computer databases is also easily pirated: respondent and similar companies would not even be put to the expense of manually copying information captured in electronic form. Uncertainty regarding the ownership

rights to such databases will accordingly inhibit their creation.

## CONCLUSION

For the foregoing reasons and those stated in the petition itself, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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